A

Uthayakumar a/l M Subramaniam v Ang Teng Bee

B

HIGH COURT (PENANG) — CIVIL APPEAL NO PA-12B-3–01 OF 2016
LIM CHONG FONG JC
6 OCTOBER 2016

C

Damages — Appeal — Appeal against award — Trial court found respondent 100% liable for negligence in road accident and awarded damages to appellant — Trial court awarded damages for appellant's left knee injury based on medical report — Appellant testified that he suffered injury on his right knee — Whether trial court adequately considered all facts and evidence available before him

D

Tort — Negligence — Res ipsa loquitur — Trial court found respondent 100% liable for negligence in road accident and awarded damages to appellant — Appellant's witnesses positively testified to occurrence of accident — Respondent absent during trial — Whether based on principle of res ipsa loquitur appellant had established prima facie case of negligence

E

The sessions court found the respondent 100% liable for a road accident in which the appellant was injured on his left knee and awarded him a mere sum of RM5,000 in damages. With regards to the damages, the sessions court judge ('SCJ') solely accepted the testimony of Dr Harvinder Kaur Sandhu ('Dr Harvinder') particularly her medical report dated 7 March 2012 that the appellant sustained injury on his left knee. However, the appellant stated that the injury was on his right leg on which he suffered contracted necrotising fasciitis which forced him to undergo above knee amputation. Aggrieved by the decisions of the SCJ, the appellant filed an appeal on the quantum of damages whereas the respondent filed a cross-appeal against the findings of liability. The respondent submitted that the SCJ erred because he failed to take into account the neutral evidence of the police investigation officer that he could not ascertain the extent of the culpability of the respondent as well of the appellant, as such, the appellant failed to prove his case. In response, the appellant submitted that all the appellant's relevant witnesses had positively testified to the occurrence of the accident but the respondent was absent during the trial. Thus, it was submitted that, based on the principle of res ipsa loquitor, the appellant had established a prima facie case of negligence that was unrebutted by an explanation consistent with the absence of negligence; hence liability was to be taken as proven against the respondent. With respect to the appeal on quantum of damages, the appellant submitted that the learned SCJ did not have sufficient judicial appreciation of the evidence before him.

F

G

H

I

Held, allowing the appeal and dismissing the cross-appeal with costs of RM5,000:

(1) In the circumstances and based on the principle of res ipsa loquitur that is plainly trite, the court held that there was no appealable error on the part of the learned SCJ to warrant appellate intervention on his findings of liability (see para 15).

(2) The learned SCJ erred by not having adequately considered all the facts and evidence available before him in deciding that the appellant's injury was sustained on the left instead of the right knee. It was undisputed that the respondent's car collided onto the appellant on his right side during the accident. It was also an undisputed fact that it was his right leg that was subsequently amputated. Further, the notation to the sketch of the leg in Dr Harvinder's medical note was ambiguous as it could read either an 'R' or 'L'. It was also undisputed that the appellant returned to the hospital for treatment for having contracted necrotising fasciitis on his knee as testified by Dato' Dr Zulkiflee bin Osman and as a result, he had to undergo above knee amputation of his right leg. In the premises, appellate intervention was warranted to compensate the appellant for the injury and loss caused to his right lower leg which was denied to him by the learned SCJ. The court thus substituted the amount of RM5,000 awarded by the SCJ with the amount of RM334,993.58 (see paras 21–22, 24–25 & 28–31).

[Bahasa Malaysia summary

Mahkamah sesyen mendapati responden bertanggungjawab 100% bagi kemalangan jalan raya di mana lutut kirinya tercedera dan diawardkan hanya sejumlah RM5,000 sebagai ganti rugi. Berkenaan ganti rugi tersebut, hakim mahkamah sesyen ('HMS') semata-mata menerima keterangan Dr Harvinder Kaur Sandhu ('Dr Harvinder') terutamanya laporan perubatannya bertarikh 7 Mac 2012 bahawa perayu mengalami kecederaan di lutut kirinya. Walau bagaimanapun, perayu menyatakan bahawa kecederaan di kaki kanannya di mana dia mengalami contracted necrotising fasciitis yang memaksanya untuk menjalani pemotongan di bahagian atas lutut kaki kanan. Tidak puas hati dengan keputusan HMS tersebut, perayu memfailkan rayuan atas kuantum ganti rugi sementara responden memfailkan rayuan balas terhadap keputusan liabiliti. Responden berhujah bahawa HMS tersilap kerana beliau gagal untuk mengambil kira keterangan neutral pegawai siasatan polis yang beliau tidak dapat pastikan sejauh mana kebersalahan responden dan juga perayu, seperti, perayu gagal untuk membuktikan kesnya. Dalam menjawab, perayu berhujah bahawa kesemua saksi relevan perayu telah secara positif memberi keterangan kepada berlakunya kemalangan tersebut tetapi responden tidak hadir semasa perbicaraan. Oleh itu, ia dihujahkan bahawa, berdasarkan prinsip res ipsa loquitor, perayu telah membuktikan kes prima facie kecuaian yang tidak dipatahkan dengan penjelasan konsisten dengan ketiadaan kecuaian; maka

liabiliti mesti diambil kira sebagi dibuktikan terhadap responden. Berkaitan rayuan ke atas kuantum ganti rugi, perayu berhujah bahawa HMS yang bijaksana tidak mempunyai penilaian kehakiman yang memadai terhadap keterangan di hadapannya.

Diputuskan, membenarkan rayuan dan menolak rayuan balas dengan kos sebanyak RM5,000:

(1) Dalam keadaan dan berdasarkan prinsip res ipsa loquitur bahawa ia adalah nyata, mahkamah memutuskan bahawa tidak terdapat kesilapan yang boleh dirayukan oleh HMS untuk mewajarkan campur tangan mahkamah rayuan ke atas dapatannya (lihat perenggan 15).

(2) HMS tersilap kerana tidak mempertimbangkan secara wajar kesemua fakta dan keterangan yang terdapat di hadapannya dalam memutuskan bahawa kecederaan perayu adalah disebelah kiri bukan lutut kanan. Ia tidak dipertikaikan bahawa kereta responden berlanggar dengan perayu di sebelah bahagian kanannya semasa kemalangan. Ia juga fakta yang tidak dipertikaikan bahawa kaki kanannya kemudiannya dipotong. Selanjutnya, notasi untuk lakaran kaki di dalam nota perubatan Dr Harvinder adalah kabur kerana ia boleh dibaca sama ada 'R' atau 'L'. Ia juga tidak dipertikaikan bahawa perayu kembali ke hospital tersebut untuk perubatan kerana mendapat necrotising fasciitis pada lututnya seperti yang diberi keterangan oleh Dato' Dr Zulkiflee bin Osman dan akibatnya, dia terpaksa menjalani pemotongan di bahagian atas lutut kaki kanannya. Oleh itu, campur tangan mahkamah rayuan adalah wajar untuk memberi pampasan kepada perayu bagi kecederaan dan kerugian yang disebabkan kepada bahagian bawah kaki kanannya yang mana dinafikan kepadanya oleh HMS yang bijaksana. Mahkamah oleh itu menggantikan jumlah RM5,000 yang diawardkan oleh HMS dengan jumlah sebanyak RM334,993.58 (lihat perenggan 21–22, 24–25 & 28–31).]

Notes

For a case on appeal against award, see 6(1) *Mallal's Digest* (5th Ed, 2015) para 462.

For cases on res ipsa loquitor, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1754–1789.

Cases referred to

Azizi bin Amran v Hizzam bin Che Hassan [2006] 4 MLJ 555, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Lee Tai Kau v Rajendran Manickam [1995] 4 MLJ 163 (refd)
Rasidin Binpartorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)

Legislation referred to

Evidence Act 1950 s 154

Ramanathan Pillai (Ram Pillai & Assoc) for the appellant.
Thanaletchimi Ratnam (K Suganthi & Co) for the respondent.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an appeal brought by the appellant/plaintiff against the trial decision of the learned sessions court judge dated 20 January 2016 ('decision') on the quantum of damages awarded arising from a road vehicle accident. There is also a cross-appeal brought by the respondent/defendant against the findings of liability in the decision.

[2] The appellant is an individual and the rider of motorcycle bearing registration No KCR 8163 ('the motorcycle') at the material time of the accident.

[3] The respondent is also an individual and the owner of the motorcar bearing registration No PGA 6975 ('motorcar') that collided onto the motorcycle.

[4] After having read the records of appeal and written submissions of the parties, I heard counsel on 26 September 2016. I thereafter adjourned the appeal to deliberate on my decision.

[5] Now after having considered the arguments brought forth by the parties, I give hereinbelow my decision on this appeal together with the supporting grounds thereto.

SALIENT BACKGROUND FACTS

[6] On 16 March 2011 at around 12.30am, the appellant was riding the motorcycle along Jalan Cantonment from his house in Midland condo. Suddenly at the front of Pasaraya Bandar Baru, the motorcar that was driven either by the defendant or her authorised driver collided onto him on the right side of the motorcycle.

[7] The appellant fell as the result thereof with injury caused on his right knee. He went home thereafter. A

[8] The appellant went for treatment at the Hospital Pulau Pinang in the morning of 16 March 2011 after the pain in his leg became intense. He was attended to by Dr Harvinder Kaur Sandhu as an outpatient. The appellant was treated with analgesic and medication to reduce the swelling and given two days medical leave. B

[9] By reason that the swelling and pain did not heal, the appellant returned to the Hospital Pulau Pinang on 20 March 2011. He was admitted and attended to by Dr Bea Kia Chuang for wound complicated with severe right leg necrotising fasciitis and septic shock. Consequently he had to undergo right leg above knee amputation on 22 March 2011 and treated in the intensive care unit for sepsis. C D

[10] The appellant was discharged from the Hospital Pulau Pinang on 8 April 2011. On his subsequent visit on 14 April 2011, he was seen by Dr Gurdit Singh who noted that his right knee amputation stump had healed well and he was referred to the rehabilitation unit for fitting of prosthesis and physiotherapy. E

CONTENTIONS AND FINDINGS

[11] I will firstly deal with the respondent's cross-appeal on liability as found by the learned sessions court judge. F

[12] The thrust of the respondent's argument is that the learned sessions court judge erred because he failed to take into account the neutral evidence of the police investigation officer that he could no ascertain the extent of the culpability of the defendant as well as of the plaintiff. As such the plaintiff failed to prove his case. G

[13] On the other side, the appellant's argument is basically that all the relevant witnesses such as the appellant and his friend, Santahan Dass a/l Rayapen who came over to the accident scene 15 minutes later positively testified to the occurrence of the accident. The defendant was absent at the trial and only the loss adjustor from the insurance company testified to explain that the defendant was not locatable. Based on *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509, the appellant submitted that relying on the principle of res ipsa loquitur, he has established a prima facie case of negligence that was unrebutted by an explanation consistent with the absence of negligence; hence liability is to be taken as proven against the respondent. H I

[14] In the pleadings of the trial, the appellant plainly pleaded res ipsa loquitur. I have reviews the grounds of decision of the learned sessions court judge. He said as follows:

> [22] In this case, there is no photograph, and the IO evidence is not able to assist the court, save for the information pertaining to the vehicle involved. Under the circumstances, since the plaintiff has managed to give his version, defendant ought to come out and offer his/her version. Defendant failed to do that.

The learned sessions court then relied on the case of *Lee Tai Kau v Rajendran Manickam* [1995] 4 MLJ 163 on res ipsa loquitur and concluded as follows:

> [25] The above case fits the current case. Based on the above I hold that since the defendant refused to give his/her version and considering SP3 evidence, the plaintiff version is more inherently probable. In the premise I found defendant is 100% liable for the accident.

[15] In the circumstances and based on the principle of res ipsa loquitur that is plainly trite, I find and hold that there is no appealable error on the part of the learned sessions court judge to warrant appellate intervention on his findings of liability.

[16] Moving on to the appellant's appeal on the quantum of compensation awarded, the learned sessions court judge allowed a mere sum of RM5,000 for pain and suffering of the appellant's left knee associated with swelling and soft tissue injury. The learned sessions court judge in this regard solely accepted the testimony of Dr Harvinder Kaur Sandhu particularly her medical report dated 7 March 2012 that the appellant sustained injury to his left knee and came for treatment at the outpatient department on 16 March 2011.

[17] The learned sessions court judge held as follows in his grounds of decision:

> [27] The first report ('P3') was made on 15 June 2011. About three months after the accident happened. And in P3, SP3 (the appellant) stated that the injury he sustained is on the right leg.
>
> [28] SP3 had a first treatment after the accident on 16 March 2011 with Hospital Pulau Pinang. And he was treated by a medical officer, Dr Harvinder Kaur Sandhu ('SP2'). And this is what SP2 stated in her medical report (exh P5) pertaining to SP3's injury:
>
> > He had sustained injury to his left knee and came for treatment to outpatient department on 16.03.2011. At outpatient department patient complained of pain at left knee associated with swelling. An X-ray of left knee was done which revealed no fracture. Patient was treated with analgesic and medication to reduce swelling. He was also given medical leave for two days (16.3.2011–17.03.2011).

[29] The point of plaintiff's contention here is that, SP2 is wrong in her diagnosis and that the injury at all material time is at the right leg.

[30] SP2 in her clarification on P5 (see exh P17) adamant that the plaintiff only injury on 16 March 2011 was a soft tissue injury of left knee.

[31] Now, I have examine SP2 evidence very thoroughly. She has done what a normal doctor would do in examine SP3 on that particular day:

(a) X-ray were taken on both leg, left and right and revealed no soft tissue injury; (refer also to P16);

(b) P16 is merely a card, and some details were not mentioned there ie about X-ray on the both SP3 leg;

(c) P16 also indicated a drawing of leg which according to SP2 referred to the plaintiff's left leg. And since P16 is her handwriting, only she could confirm that.

[32] If the plaintiff really sustained an injury on his right leg, he would have complaint to SP2. Well, perhaps he would have even scolded SP2 for treating the wrong leg. And yet there is no complaint about that. And conveniently, via report P3, he emphasized that the injury was on the right leg. As regard to SP5 (Santahan Dass a/l Rayapen) evidence, despite allegation that he saw what appeared to be injury on the SP3's right leg, he is not the doctor who examined that and I also doubt his evidence on that. SP3 in his own evidence stated that:

> Pada masa itu saya terlambat untuk pergi kerja dan beritahu rakan saya untuk berunding. Selepas kemalangan, kaki saya tidak berapa sakit. Tetapi dalam waktu kerja, kaki saya bengkak ...

[33] There was no evidence at all SP3 'tempang kaki kanan' as alleged by SP5. For that part, SP5 evidence shall be rejected.

[34] I also considered other evidence, SP7 — Dr Zulkiflee bin Osman. SP7 only confirmed that necrotizing fasciitis is one of the orthopedic emergency and that one must have prior injury before this necrotizing injuries. He is of the opinion that SP3 situation is consistent with prior injury necrotizing fasciitis. But he never confirmed that injury is on the right leg.

[35] Taking into consideration of all above, SP2 evidence and the fact that SP3 took almost 3 months to lodge a report pertaining to the injury, I have serious doubt about his evidence. And with that I hold that, on balance of probability, SP2 evidence is more credible and thus exh P5 and P17 stand as it is, whereby the plaintiff injury as diagnose by SP2 would be a soft tissue injury on the left knee.

[36] With that finding, I further hold that the plaintiff has failed to proof that the injury of his right knee is related to the accident. There is a gap for three days after the accident and that the injury on his right leg (see exh P7) was not proven to be accident related.

[18] The respondent obviously agreed with the findings of the learned sessions court judge but the appellant contended the learned judge did not have

sufficient judicial appreciation of the evidence before him particularly that the medical report of Dr Harvinder Kaur Sandhu was prepared a year after the appellant's visit to the hospital and Dato' Dr Sukumar a/l AV Mahesan, the director of the Hospital Pulau Pinang testified that two X-rays were done on both knees of the appellant from the master register of X-ray records of the hospital. The appellant also submitted that although Dr Harvinder Kaur Sandhu was called as the appellant's witness, her testimony has been challenged by the appellant and she was cross-examined by the appellant pursuant to s 154 of the Evidence Act 1950 with the permission of the court.

[19] Generally, an appellate court will not disturb the findings of the trial judge especially if they are related to findings of fact. Wan Suleiman FCJ said as follows in the Federal Court case of *Rasidin Binpartorjo v Frederick Kiai* [1976] 2 MLJ 214:

> I am of the opinion that the appeal against the judge's finding that both motorcyclists were to blame should be dismissed. The evidence in support of each party's version was purely oral. It cannot be tested by independent evidence such as to be found in a police sketch plan (which by the time of the trial had been destroyed). The learned trial judge preferred the plaintiff's version to that of the defendant's, and in these circumstances, it would be wrong of us who have not seen or heard the witnesses, to substitute our own finding for that of the learned trial judge.

[20] That notwithstanding, Gopal Sri Ram JCA (later FCJ) held as follows in the Court of Appeal case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.
>
> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[21] Upon reviewing the evidence particularly the documentary evidence available before me, I am of the view that the learned sessions court judge erred by not having adequately considered all the facts and evidence available before him in so deciding that the appellant's injury was sustained on the left instead of the right knee. In other words, he failed to undertake a critical analysis of the entire evidence particularly the silent evidence in the light of the probabilities of the case.

[22] In this regard, it is an undisputed fact that the motorcar collided onto the appellant on his right side during the accident. It is also an undisputed fact that it was his right leg that was subsequently amputated. There was no adduction of direct evidence to the contrary by the respondent.

[23] There were X-rays taken not on one but both legs of the appellant on 16 March 2011 as directed by Dr Harvinder Kaur Sandhu before treating him. The appellant asserted that he was treated on his right knee but Dr Harvinder asserted otherwise. The appellant stated the same too in his first police report three months later on 15 June 2016 because he was unable to move which is to my mind a truthful and reasonable explanation because his leg had been amputated. I think the learned sessions court judge unfairly doubted his testimony because of the late making of his police report. In addition, the learned sessions court judge wondered why the appellant did not complain or scolded Dr Harvinder for treating the wrong leg. The simple answer to me is that she actually treated his right leg.

[24] On the other hand, the learned sessions court judge accepted Dr Harvinder Kaur Sandhu's medical report that stated she treated the appellant's left leg. The medical report was only prepared about a year later on 7 March 2012. In my view, she would surely not remember how she treated the appellant without her medical notes in view of the numerous patients she had seen and treated in the Hospital Pulau Pinang since she last treated the appellant. On critical examination of her medical note/card ('exh P16'), it seems to me that the notation to the sketch of the leg therein is ambiguous. It could read either an 'R' or 'L' alphabet although she strenuously testified that it was an 'L' alphabet from her own handwriting. There was also an error therein pertaining to the X-ray where one instead of two X-rays was stated therein. She merely treated the appellant superficially for pain and swelling of his knee after she had identified that there was no fracture. She did not however treat the appellant to prevent him contracting necrotising fasciitis. In the circumstances, I would have viewed her testimony with some reservation.

[25] It is also undisputed that the appellant returned to the Hospital Pulau Pinang for treatment on 20 March 2011 for having contracted necrotising fasciitis on his knee as testified by Dato' Dr Zulkiflee bin Osman. As the result

he had to undergo above knee amputation of his right leg.

[26] The respondent contended that the appellant's contraction of necrotising fasciitis might not have been connected with the accident but due to some other incident. This has however not been proven by the respondent. The duration of four days between the occurrence of the accident and the readmission of the appellant in the Hospital Pulau Pinang for necrotising fasciitis and septic shock is consistent with the time normally taken for necrotising fasciitis to have caused the wounded right leg to turn septic. By inference, the root cause of the infection had to be because of the accident by reason that the events were so closely proximate to each other in my view.

[27] The appellant succumbed to necrotising fasciitis because he has a poor body immune function. This does not however diminish the respondent's liability because the respondent must take the appellant as he is. In *Azizi bin Amran v Hizzam bin Che Hassan* [2006] 4 MLJ 555, Zulkefli Makinuddin JCA (now CJ (Malaya)) held as follows with emphasis added:

> [9] ... *In this regard, we would agree with the submission of learned counsel for the plaintiff that the defendant must take his victim as he finds him. This is the egg-shell skull rule*. On this point, in the case of *Watts v Rake*, Dixon CJ at p 160 had this to say:
>
> > If the injury proves more serious in its incidents and its consequences because of the injured man's condition, that does nothing but increase the damages the defendant must pay. To sever the remaining leg of a one-legged man or put out the eye of a one-eyed man is to do afar more serious injury than it would have been had the injured man possessed two legs or two eyes. But for the seriousness of the injury the defendant must pay. 'A negligent defendant must take his victim as he finds him and pay damages accordingly. The fact that the person injured was peculiarly susceptible to ensuing complications that would not in a normal person have followed from the injuries received, or that the person injured already had a disability which made the injury the more disabling — eg the loss of an only eye — does not mean that damages are not to be assessed according to the circumstances of the particular case.
>
> [10] In the same case, Menzies J at p 164 stated as follows:
>
> > A negligent defendant must take his victim as he finds him and pay damages accordingly. The fact that the person injured was peculiarly susceptible to ensuing complications that would not in a normal person have followed from the injuries received, or that the person injured already had a disability which made the injury the more disabling — eg the loss of an only eye — does not mean that damages are not to be assessed according to the circumstances of the particular case.

[28] In the premises, I am of the view that appellate intervention is warranted here to compensate the appellant for the injury and loss caused to his right lower leg which was denied to him by the learned sessions court judge.

[29] Consequently, the quantum of compensation in damages that should fairly be awarded to the appellant is RM334,993.58 comprising the following as already assessed by the learned sessions court judge in his decision:

(a) RM80,000 for amputation of the right leg above knee;

(b) RM133,230 + 6%GST totaling to RM141,223.80 for prosthetic leg; and

(c) RM113,769.78 for loss of earnings.

[30] This amount is acceptable to the appellant and unchallenged by the respondent in the appeal.

CONCLUSION

[31] For the foregoing reasons, I allow the appeal to the extent that the general damages allowed is substituted to RM334,933.58 in lieu of RM5,000. I also allow pre judgment interest of 5%pa on the sums of RM80,000 and RM141,223.80 and of 2 1/2pa on the sum of RM113,769.78 and thereafter post judgment interest of 5%pa on RM334,993.58 until full realisation. The cross-appeal is dismissed. The respondent shall pay the appellant the costs of this appeal amounting to RM5,000.

Appeal allowed; cross-appeal dismissed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar